

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2/1/2018 4:09 PM  
BY SUSAN L. CARLSON  
CLERK

NO. 95015-6

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**SUPREME COURT OF THE  
STATE OF WASHINGTON**

BNSF RAILWAY COMPANY, Respondent

v.

THOMAS B. CLARK, MD, Pierce County Medical Examiner, and  
PIERCE COUNTY MEDICAL EXAMINER, Petitioners.

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**PETITIONERS' OPENING BRIEF**

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## **I. INTRODUCTION**

A pedestrian was struck by a Burlington Northern Santa Fe Railway Company (BNSF) train while on tracks operated by BNSF. The Pierce County Medical Examiner, Dr. Thomas Clark commenced an investigation of the death as an unnatural one involving the possibility of suicide.

Mounted on the train was a camera that recorded video of the incident. Dr. Clark requested a copy of the video for purposes of his death investigation. BNSF was willing to permit Dr. Clark and any of his staff to view the video and at a time and place of their convenience, and multiple times if necessary. BNSF was unwilling, however, to provide a copy of the video to Dr. Clark.

For a number of reasons the response of BNSF failed to meet Dr. Clark's professional needs. Dr. Clark therefore gave notice to the Pierce County superior court that was convening an inquest proceeding. He also indicated that he did not yet need the jurors convened, and would notify the court at a later time, when he would. It was always Dr. Clark's intention to pursue the inquest proceeding to a conclusion.

Dr. Clark then exercised his subpoena authority pursuant to RCW 36.24.050 and issued a subpoena to BNSF to produce a copy of the video. BNSF opposed the subpoena by filing a petition for writ of mandamus and

writ of prohibition to the Pierce County Superior Court. The court issued the writ, prohibiting Dr. Clark from enforcing his subpoena, or from issuing any additional subpoenas to BNSF.

This dispute relates to the nature and scope of the medical examiner's subpoena authority under RCW 36.24.050. It is the position of Dr. Clark that at a minimum he has authority to issue a subpoena once he has commenced an inquest proceeding by notifying the court that he is doing so. It is also Dr. Clark's position that he can subpoena not only persons, but also records, and that he may obtain them prior to presenting them to the jury.

BNSF, on the other hand, contended that the subpoena power only permits the medical examiner to compel witnesses to appear before the inquest jurors so that it does not have to produce a copy of the video, and that Dr. Clark's subpoena was issued prematurely where the inquest jury had not yet been convened.

On appeal, Dr. Clark asks this court to hold that he validly exercised his subpoena authority, that BNSF is obligated to honor the subpoena and produce a copy of the video, and that the trial court exceeded its authority when it issued the writ of prohibition. He therefore asks this court to reverse the ruling of the trial court.

## **II. ASSIGNMENTS OF ERROR**

1. The court erred when it entered its initial order issuing the writ of prohibition of petitioner BNSF. [See, e.g. CP 68-69.]
2. The court erred when it granted the motion for summary judgment of petitioner BNSF. [See, e.g. CP 165; 171-72.]
3. The court erred when it denied the motion for summary judgment of Respondents Dr. Clark and the Pierce County Medical Examiner's Office. [See, e.g. CP 165; 171-72.]
4. The court erred when it issued the final writ of Prohibition to Dr. Clark directing him to withdraw or not enforce the subpoena he issued to BNSF Railway Company and the interim prohibition was made permanent. [See, e.g. CP 165; 171-72.]
5. The court erred when it entered judgment in favor of Petitioner. [See, e.g. CP 171-72.]

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Does Chapter 36.24 RCW grant Coroners and Medical Examiners the authority to issue subpoenas for evidence in inquest proceedings?

Assignments of Error 2-4.

2. At what point in the inquest process does the subpoena authority arise?



Assignments of Error 2-4.

3. What is the nature and extent of inquest subpoena authority?

Assignments of Error 2-4.

4. Were Dr. Clark's actions in convening the inquest sufficient to cause his subpoena authority to arise?

Assignments of Error 2-4.

5. Was Dr. Clark's subpoena authority sufficient to permit him to direct BNSF Railway Company to produce the video recording of the death incident?

Assignments of Error 2-4

6. Did the court improperly issue the writ of prohibition directing Dr. Clark to not enforce his subpoena to BNSF or issue a new subpoena?

Assignments of Error 1, 5.

#### **IV. STATEMENT OF THE CASE**

##### **A. FACTS OF THE CASE**

On or about February 5, 2017, the Pierce County Medical Examiner's Office received a report of an unnatural death in Puyallup, Washington that warranted investigation. It was a death that reportedly occurred as a result of the decedent being struck by a moving train

operated by the Burlington Northern Santa Fe Railroad Company (BNSF). During the course of the investigation a question arose as to whether or not the death may have possibly been the result of suicide. CP 136, ¶19.

The death scene was investigated by officers of the Puyallup Police Department, investigators employed by BNSF, and a Medicolegal Death Investigator from the Medical Examiner's office. The Medical Examiner's office became aware of the existence of recorded video of the incident in the possession of BNSF. Dr. Clark directed his staff to request a copy of the video from BNSF. CP 136, ¶ 20.

BNSF was unwilling to provide the Medical Examiner's office with a copy of the video recording. They did offer to make the video available for viewing and indicated that they were willing to do so at any time or place of the Medical Examiner's choosing and to present it for as long as was necessary, as many times as was necessary. In doing so, BNSF staff insisted on doing so in a manner that ensured they maintained control of the video at all times, the implication being that it was in order to ensure that the video was not copied. CP 136-37 ¶ 21.

To that end, on February 14, 2017, two BNSF employees arrived at the Medical Examiner's offices without an appointment or prior arrangement and attempted to insist upon showing the video to Dr. Clark at that time. The BNSF employees communicated with Medicolegal

Investigator, Richard O'Brien. Mr. O'Brien conveyed their message to Dr. Clark, however, Dr. Clark was occupied with other matters and was unavailable to review the video at that time. CP 137 ¶ 22.

The appearance of the BNSF staff in that manner reflected a complete lack of understanding of how death investigations are conducted and relevant evidence reviewed. The nature of a death investigation is in many ways different from a typical police investigation of a crime. Even if Dr. Clark had been available, for the reasons explained below, it would not have been sufficient for him to simply view the video, as, e.g., was done by the Puyallup Police officers. Dr. Clark informed Mr. O'Brien that he would instead seek to obtain the video by subpoena, which Mr. O'Brien apparently communicated to the BNSF employees. CP 137, ¶ 22.

The Petition makes the claim that the BNSF employees were told that Dr. Clark wanted the video for use as a training video. That statement is completely incorrect, although it could be the product of a misunderstanding. CP 137, ¶ 23.

The Medical Examiner's office has Medicolegal Investigators on-duty 24 hours a day. Dr. Clark needs a copy of the video so that, in part, all of them have a chance to review the video when their other duties permit, even if they are unable to attend the staffing. CP 137, ¶ 24.

For purposes of a death investigation and prior to making a final determination, Dr. Clark first conducts a case review with as many of his staff as possible. This is particularly important in cases involving challenging death determinations. The primary purpose of this staffing is to make the best determination by obtaining the assessments of the evidence from as many staff members as possible. This diversity of perspectives helps to ensure that no relevant facts or considerations are overlooked in making the death determination. The staff do not always initially view the evidence in the same way, and those differences may lead to valuable insights and inform Dr. Clark's ultimate determination. This staffing process is an important part of the investigation. CP 138, ¶ 25.

The diversity of perspectives also adds to the experience of each investigator who views it. Because each death investigation is unique, part of developing staff experience in forensic pathology involves exposure to as large a number of investigations and death determinations as possible. That depth of experience informs future investigations and improves death investigations, from the initial collection of evidence, all the way through to the autopsy process, to the final determination of the cause of death. CP 138, ¶ 26.

Mr. O'Brien told Dr. Clark that he has no recollection of making any statements about training. Dr. Clark can only infer that Mr. O'Brien may have made reference to the case review staffing and its secondary training purpose when he spoke with BNSF staff, and that somehow led them to the mistaken understanding that Dr. Clark intended to use the video as a training video. Dr. Clark has no intention to use or maintain the video as a training video other than what would normally occur in the context of making the death determination solely within this case. CP 138, ¶ 27.

The offer of BNSF to make the video available for viewing is nonetheless insufficient to the needs of the Medical Examiner's office for purposes of conducting the death investigation. It will be necessary for Dr. Clark to review the video with all the staff that participate in the review. To do so they will evaluate the video with regard to the forensic evidence and the decedent's medical history. That evaluation may involve the review and discussion of sensitive medical information protected by HIPAA. Further, death investigations are to be maintained as confidential. It would therefore be improper for Dr. Clark to conduct the investigation, and particularly the review and discussion of the video, in the presence of BNSF employees. CP 138-39, ¶ 28.

It may also be necessary during the staffing to discuss environmental factors that affected the death. It would not be appropriate to discuss those factors in front of a representative of an owner of the environment. For example, in the case of a death in a parking lot, it would not be appropriate to discuss factors in the parking lot in front of a representative of the owner of the parking lot. Similar issues would apply to social factors or the actions of other persons who are present at the death scene. CP 139, ¶ 29.

**B. PROCEDURAL POSTURE**

On March 14, 2017, Dr. Clark sent a letter to the Pierce County Superior Court Administrator which notified the administrator that Dr. Clark was initiating an inquest proceeding, but also indicated that Dr. Clark did not need a jury empaneled at that time, and that Dr. Clark would notify him at a later time when he would need a jury empaneled. CP 139, ¶ 30; CP 143.

On March 17, 2017, Dr. Clark caused a subpoena he issued to be served on BNSF directing them to produce a copy of the video. CP 139, ¶ 31; CP 145-47.

BNSF initiated this action in which it petitioned for a writ of prohibition. CP 1-14. In conjunction with that petition, the Court issued a writ of prohibition staying enforcement of the subpoena and directed Dr.

Clark to respond. CP 68-70. Dr. Clark answered, asking the court to dismiss the writ of prohibition. CP 77-84; CP 139.

The parties submitted the matter to the court on cross motions for summary judgment. CP 85-109; 110-147; 148-155; 156-162. The trial court deferred ruling on the motions to give counsel time to discuss a proposed solution with their clients. CP 164.

On August 21, 2017 the court issued an order granting the motion for summary judgment of BNSF and denying the motion for summary judgment of Dr. Clark. CP 65.

On September 19, 2017, Dr. Clark filed a notice of appeal where no judgment had yet been entered. CP 166-67. On October 2, 2017 the court entered judgment for BNSF affirming the writ of prohibition and prohibiting Dr. Clark from enforcing his subpoena. CP 171-72.

## **V. ARGUMENT**

### **A. STANDARD OF REVIEW**

#### **1. Writ of Prohibition**

A Writ of prohibition is reviewed for abuse of discretion. *In Re: Jurisdiction of Exam'r*, 135 Wn. App. 312, 318 (2006). Upon review the court considers "the character and function of the writ of prohibition together with all the facts and circumstances shown by the record." *In re Jurisdiction of Exam'r*, 135 Wn. App. at 318 (quoting *City of Olympia v.*

*Thurston County Bd. of Comm'rs*, 131 Wn. App. 85, 91 (2005). *See, also, County of Spokane v. Local #1553, Am. Fed'n of State, County & Mun. Employees*, 76 W.n Ap. 765, 768 (1995).

It is long-established law, however, "that a writ of prohibition, is an extraordinary remedy available only where the tribunal is clearly and inarguably acting in a matter where there is an inherent, entire lack of jurisdiction." *Barnes v. Thomas*, 96 Wn.2d 316, 318 (191). *See, also, In re Jurisdiction of Exam'r*, 135 Wn. App. at 318.

As a drastic remedy, a writ of prohibition is only proper where (1) it appears that the body to which it is directed is about to act in excess of its jurisdiction; and (2) the petitioner does not have a plain, speedy, and adequate remedy in the ordinary course of law. *In re Jurisdiction of Exam'r*, 135 Wn. App. at 318.

Applying that test to this case, in order to determine whether the trial court abused its discretion in issuing the writ of prohibition, this Court must decide whether (1) it is clear and inarguable that the Medical Examiner lacked jurisdiction to issue the subpoena; and (2) whether the BNSF Railway Company had a plain, speedy and adequate remedy in the ordinary course of law.

The question of whether the Medical Examiner lacked jurisdiction to issue the subpoena is a question of law. This is essentially the issue the



parties submitted to the court on summary judgment. Whether the law is clear and unarguable on that issue is a question for this Court to address.

Because the matter was submitted to the court on an undisputed factual record, the court ruled on the summary judgment motions as a matter of law. The trial court did not enter any conclusions of law, however, this Court reviews *de novo* the legal determinations of the trial court. *Howe v. Douglas County*, 146 Wn.2d 183, 188 (2002). Petitioner Dr. Clark now challenges the trial court's legal determination as a matter of law.

**B. THE MEDICAL EXAMINER HAS SUBPOENA AUTHORITY**

County Medical Examiners have the authority to perform all the statutory duties of a coroner. RCW 36.24.190. Coroners have the power to issue subpoenas for witnesses. RCW 36.24.050. In its entirety, the section provides:

The coroner may issue subpoenas for witnesses returnable forthwith or at such time and place as the coroner may appoint, which may be served by any competent person. The coroner must summon and examine as witnesses, on oath administered by the coroner, every person, who, in his or her opinion or that of any of the jury, has any knowledge of the facts. A witness served with a subpoena may be compelled to attend and testify, or be punished by the coroner for disobedience, in like manner as upon a subpoena issued by a district judge.

RCW 36.24.050.

In the context of this case, this statutory provision implicates several questions. First, is the subpoena power a general power of the coroner, or does it only come into existence once an inquest has begun? Does it only empower the coroner to present the witness to inquest jurors, or does it also empower the coroner to obtain and review evidence prior to any presentation to the jurors? Third, does the coroner's subpoena power include the power of a subpoena duces tecum to produce records, or is it limited to the power to only order persons to appear and testify?

In order to properly address these questions, it is necessary to review the role of coroners and medical examiners and the statutes governing their duties.

**C. BACKGROUND ON THE ROLE OF MEDICAL EXAMINERS AND CORONERS**

**1. The Legal Origins of Inquests in Washington**

Society has long had the need for a means to determine the cause of death, at least with regard to deaths that occur under unusual or suspicious circumstances. Prior to the advent of modern professional forensic pathology, this role was filled in most American jurisdictions, including Washington, by the county coroner. In Washington the role of coroner in the determination of the cause of certain deaths dates to the first Territorial Legislature. 1854 LAWS OF WASH. [TERR.] p. 435-438. The

coroner performed a quasi-law enforcement function by determining, if possible, the identity of the deceased, the manner of death, whether or not the death was the result of a crime, and if so the persons responsible therefore. 1854 LAWS OF WASH. [TERR.] p. 436, sec. 3, 5. The coroner pursued these responsibilities by way of an inquest process in which four to six jurors were empaneled and made the relevant factual determinations. 1854 LAWS OF WASH. [TERR.] p. 436, sec. 3, 5.

The coroner was granted authority to issue subpoenas for witnesses and was required to summon and examine as witnesses every person who in his opinion, or that of any of the jury, had any knowledge of the facts. 1854 LAWS OF WASH. [TERR.] p. 436, sec. 6. The coroner was also permitted to summon a surgeon or physician to give a professional opinion as to the cause of death. 1854 LAWS OF WASH. [TERR.] p. 436, sec. 6.

The statutes governing the role of the coroner have evolved slightly over time, but remain remarkably similar to those in place since the first Washington Territorial Legislature Convened. Compare 1854 LAWS OF WASH. [TERR.], p. 435-38 with the current Chapter 36.24 RCW. One significant difference is that the coroner now has discretion whether to conduct an inquest. See RCW 36.24.020.

## **2. Medical Examiners Authorized in Larger Counties**

In light of the advances of the modern profession of forensic

pathology, in 1996 the Legislature authorized counties with a population of 250,000 or more to replace the elected office of coroner with an appointed medical examiner. See 1996 LAWS OF WASH. c 108 (amending RCW 36.16.030 and adding a new section that was numbered RCW 36.24.190). The medical examiner assumes the statutory duties performed by the coroner. RCW 36.24.190. *See, also*, RCW 36.16.030.

**D. THE TWO PROCESSES BY WHICH MEDICAL EXAMINERS MAY PURSUE A DETERMINATION OF THE CAUSE OF A DEATH ARE EITHER BY AN AUTOPSY/POST-MORTEM OR BY AN INQUEST**

The traditional authority of Coroners and Medical Examiners to conduct an inquest is detailed in Chapter 36.24 RCW. Where that process was once mandatory, it is now discretionary on the part of the Coroner or Medical Examiner as to whether or not to conduct an inquest. RCW 36.24.020 ("Any coroner, in his or her discretion, *may* hold an inquest..."). [Emphasis added.]

Coroners and Medical Examiners are now separately granted discretion to authorize an autopsy or postmortem examination of the decedent in cases where a coroner is authorized to hold an inquest. *See* RCW 68.50.100(1).<sup>1</sup>

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<sup>1</sup> The autopsy or post-mortem examination is one of several activities that the legislature has identified as being part of a death investigation. *See* RCW 43.79.445; RCW 68.20.104(2). Thus, the phrase "death investigation" is sometimes used for such activities, including, but not limited to, autopsies and postmortem examinations.

PROVIDED that the coroner, in his or her discretion, may make, or cause to be made by a competent pathologist, toxicologist, or physician, an autopsy or postmortem in any case in which the coroner has jurisdiction of the body...

This provision also authorizes Medical Examiners to conduct autopsies and postmortem examinations. *See* RCW 68.50.100(1); RCW 36.24.190.

**E. DR. CLARK IS LEGALLY REQUIRED TO MAINTAIN A COPY OF THE VIDEO FROM THE TRAIN IF HE USES IT TO DETERMINE THE CAUSE OF DEATH**

**1. The Medical Examiner Must Preserve Death Investigation Records**

The Medical Examiner is legally required to preserve death investigation records. The Medical Examiner is bound keep certain records by public record retention laws. *See* RCW 40.14.070. Public Records include records that have been received by any agency. RCW 40.14.010. Death investigation records have been designated as confidential. RCW 68.50.105. Nonetheless, the state archivist has designated them for permanent retention with confidentiality being retained at the Washington State Archives. *See* Wash. State Archives Disposition Authority No. (DAN) C050-34-03, Rev. 1.

These provisions require the Medical Examiner to possess and maintain a copy of any record reviewed in a death investigation.

## **2. The Medical Examiner Must Also Maintain a Complete Record for Purposes of Judicial Review**

While an inquest determination is not appealable, a medical examiner's death determination made outside of an inquest is subject to judicial review.

A county coroner or medical examiner or persons acting in that capacity shall be immune from civil liability for determining the cause and manner of death. The accuracy of the determination is subject to judicial review.

RCW 68.50.015.

It is inherent in the nature of judicial review that the same record that served as the basis for the original decision needs be available to the court for its later review. The absence of any part thereof may invalidate the Medical Examiner's determination based not upon the merits, but upon a deficient record or a lack of sufficiency of the evidence.

Here if the Medical Examiner were to review a copy of the train video, but not retain a copy of it, he would fail to maintain a record sufficient for judicial review.

### **F. THE JURISPRUDENTIAL NATURE OF INQUEST PROCEEDINGS**

The conduct of coroner's inquests is governed by Chapter 36.24

RCW.

"[...] [T]he purpose of a coroner's inquest is to determine who died, what was the cause of death and what were the

circumstances surrounding the death, including any criminal actors who may be liable for the death."

*Carrick v. Locke*, 125 Wn.2d 129, 133 (1994).

The appointed Medical Examiner assumes the statutory duties performed by the County Coroner. RCW 36.24.190. The duty of conducting the inquest may also be delegated to a district court judge. *See* RCW 36.24.160. *See, also, Carrick v. Locke*, 125 Wn.2d 129 (1994).

Although a coroner's inquest may be delegated to a judge, the conduct of an inquest remains an executive function, not a judicial one. *In re Boston*, 112 Wn. App. 114, 118 (2002). It is not an adversary proceeding, but the means by which the executive determines the cause of death. *Boston*, 112 Wn. App. at 118.

Nonetheless, inquests have quasi-judicial aspects. *Boston*, 112 Wn. App. at 118. They are not purely executive or judicial, but fall in a gray area at the periphery between both the executive and the judicial. *Boston*, 112 Wn. App. at 118 (*citing Carrick*, 125 Wn.2d at 139). An inquest involves cooperation between the executive and judicial branches so that it may be undertaken by either branch. *Carrick*, 125 Wn.2d at 128. However, even when an inquest is conducted by a judge, the judge operates not as a court, but as a delegate of the executive. *Boston*, 112 Wn. App. at 120.

The results of coroner's inquests are not binding upon anyone. *Boston*, 112 Wn. App. at 118. Coroner's inquests may not be appealed or set aside by the court. *Boston*, 112 Wn. App. at 118-119. "Although some jurisdictions have recognized a limited right to petition for a writ of mandamus or prohibition against the coroner where the coroner has acted arbitrarily, direct appeal is uniformly disallowed." *Boston*, 112 Wn. App. at 119.

Pierce County has chosen to exercise its option to replace the office of coroner with an appointed medical examiner. *See* RCW 36.24.190; Pierce County Code (PCC) 2.06.010(A)(7), (H).

As the Pierce County Medical Examiner, Dr. Clark heads, and is the appointed Director of, the Pierce County Medical Examiner Department, an executive department of Pierce County. PCC 2.06.010(A)(7), (H).

By code the Medical Examiner Department performs three functions:

- a. Protecting the public health, safety, and welfare by determining the cause and manner of sudden, unexpected, violent, suspicious, or unnatural deaths with the use of trained medical evaluation and investigatory procedures.
- b. Providing documented, impartial medical evidence for civil and criminal proceedings.



- c. Exposing unrecognized and industrial hazards to public health.

PCC 2.06.010(H).

The first function, the determination of the cause of death in the event of certain circumstances, is a function the medical examiner is authorized to perform pursuant to RCW 68.50.010, .015.

#### **G. INQUEST PROCEDURE**

The statutes establishing coroner's inquests address procedures for the process generally, with occasional pronouncements on specific issues, but do not provide detailed procedures of the type that govern most court proceedings, e.g., through court rules. The statutes appear to grant wide latitude to the coroner or medical examiner as to how to conduct the proceeding. This makes sense given that an inquest serves as a means by which the executive branch, in the person of the coroner or medical examiner, determines the cause of death.

[...] Any coroner, in his or her discretion, may hold an inquest if the coroner suspects that the death of a person was unnatural, or violent, or resulted from unlawful means, or from suspicious circumstances, or was of such a nature as to indicate the possibility of death by the hand of the deceased or through the instrumentality of some other person [...].

To commence an inquest proceeding, the coroner "... shall notify the superior court to provide persons to serve as a jury of inquest to hear

all the evidence concerning the death and to inquire into and render a true verdict on the cause of death." RCW 36.24.020.

At the coroner's request, the superior court shall schedule a courtroom in which the inquest may be convened, a bailiff, reporter, and any security deemed reasonably necessary by the coroner.

RCW 36.24.020. "The coroner and the superior court shall set an inquest date by mutual agreement. The inquest shall take place within eighteen months of the coroner's request to the court." RCW 36.24.020.

The coroner may adjourn the inquest from time to time as he or she may deem necessary.

RCW 36.24.020.

To the extent that the medical examiner's subpoena authority is contingent upon there being an inquest, it is the position of the appellant that such authority arises when the inquest is commenced, and that occurs upon notice to the clerk of the superior court.

**H. THE MEDICAL EXAMINER ISSUED A SUBPOENA TO BNSF PURSUANT TO A VALID EXERCISE OF HIS AUTHORITY**

On March 14, 2017, the Medical Examiner sent a letter to the Superior Court Administrator, indicating that he was initiating an inquest, but that a jury need not be empaneled yet. CP 143. Dr. Clark believes he has commenced an inquest proceeding. CP 161. Further, it was always, and remains, Dr. Clark's intention to pursue the inquest process to

completion. CP 162.

After notifying the superior court that he was commencing an inquest, the Medical Examiner then issued a subpoena to BNSF to produce a copy of the video. CP 145-147.

The statutes that govern coroner's inquests grant a great deal of discretionary authority to the coroner or medical examiner as to the specifics of how an inquest is to be conducted. This is because, with regard to the procedures for conducting an inquest, the statutes are largely silent, addressing the procedure only on a general level without specific detail. Inquest proceedings are closely analogous to grand jury proceedings. *See Carrick v. Locke*, 125 Wn.2d 129, 137 (1994). While Petitioner could find no Washington case that addresses the standard of review of a medical examiner's decision regarding the specifics of how an inquest is conducted, given the lack of specificity in the statutes, the medical examiner's discretionary decisions should be granted wide deference.

The subpoena authority of the Coroner and Medical Examiner is stated in RCW 36.24.050. Nothing in that provision conditions the subpoena authority on the inquest jury having been empaneled.

The coroner may issue subpoenas for witnesses returnable forthwith or at such time and place as the coroner may appoint, which may be served by any competent person.

The coroner must summon and examine as witnesses, on oath administered by the coroner, every person, who, in his or her opinion or that of any of the jury, has any knowledge of the facts. A witness served with a subpoena may be compelled to attend and testify, or be punished by the coroner for disobedience, in like manner as upon a subpoena issued by a district judge.

RCW 36.24.050. It is particularly noteworthy that this passage provides that, "... subpoenas issued by the coroner are returnable forthwith, or at such time and place as the coroner may appoint ...." [Emphasis added.]

The Supreme Court may adopt rules of procedure for district courts. RCW 3.30.080. District court judges may issue subpoenas to command persons to attend and give testimony or to produce and permit inspection and copying of designated documents, etc. CRLJ 45(a)(1)(c). "A command to a person to produce evidence [...] may be joined with a command to appear at trial, or hearing or at deposition, or may be issued separately." CRLJ 45(a)(3).

BNSF argued below that the subpoena issued by the Medical Examiner is not valid because a jury had not been convened. That interpretation is too narrow given the broad grant of discretion given to Medical Examiners on how to conduct an inquest, as well as the specific language in the statute.

As BNSF has noted, the language of RCW 36.24.050 provides that the coroner may issues subpoenas returnable at such time and place as the

coroner may appoint. This provision then directly affirms the coroner's authority to issue subpoenas at times and locations other than the taking of inquest testimony. A grant of such authority makes sense. As a practical matter the coroner will need to review the evidence before presenting it to the inquest jury in order to determine whether to present evidence, what evidence to present from a given witness or source, and the manner in which such evidence will be presented. The ability to review the evidence outside the conduct of the inquest is inherent to the proper conduct of the inquest.

Further, RCW 36.24.020 merely requires that the inquest take place within eighteen months of the coroner's request. Finally, it specifies that the coroner may adjourn the inquest from time to time as the coroner deems necessary. RCW 36.24.020.

These statutory provisions establish the coroner's authority to issues subpoenas prior to the inquest jury being convened. This is particularly so when considered in light of the coroner's broad discretion on how to conduct the inquest. It is further reinforced by the fundamental practicality of obtaining and reviewing the evidence prior to presenting it to the jury.

Here, Dr. Clark, as required by RCW 36.24.020, notified the Superior Court Administrator by his letter of March 14, 2017, that he was

convening an inquest and that he would need persons to serve as a jury of inquest. This was sufficient to commence the inquest, so that Dr. Clark's subpoena to BNSF issued lawfully and is valid.

For all these reasons, the Court should affirm the Medical Examiner's authority to issue the subpoena to BNSF as he did.

**I. RESPONDENT'S ARGUMENT THAT ALL EVIDENCE MUST BE PRESENTED TO THE INQUEST JURY MISSES THE POINT**

BNSF argued below that the response to the subpoena may only be made to the jury itself because RCW 36.24.020 provides that the Medical Examiner, "... shall notify the superior court to provide persons to serve as a jury of inquest to hear all the evidence concerning the death and to inquire into and render a true verdict on the cause of death." CP 96.

This argument misses the point. The Medical Examiner, in presenting evidence to the inquest jury, will always have a need to review potential evidence to determine whether and what portion of something is relevant evidence. The Medical Examiner's investigation of the evidence is the necessary condition precedent to the conduct of the inquest before the jury. In the context of the video, depending upon the length of the video provided this may mean reviewing and redacting the footage to those portions that are relevant. It may also mean seeking additional footage beyond that provided.

If all subpoenaed evidence were required to be produced only directly to the jury, there would be no point to including the language that the subpoenas may issue "[...] returnable [...] at such time and place as the coroner may appoint [...]." *See* RCW 36.24.050.

**J.     THE OFFER OF BNSF TO PERMIT DR. CLARK AND HIS STAFF TO VIEW THE VIDEO WITHOUT RECEIVING A COPY OF IT IS INSUFFICIENT TO MEET HIS LEGAL REQUIREMENTS OR PROFESSIONAL NEEDS**

The position of BNSF is that while they are unwilling to produce a copy of the video to Dr. Clark, they have offered to make a copy of the video available for viewing, and that should be sufficient for the Medical Examiner's purposes. Unfortunately, BNSF's proposal is insufficient to meet the Medical Examiner's needs.

Dr. Clark previously discussed his statutory obligation to preserve the records of the death investigation as well as the legal necessity of maintaining a complete record of the investigation for purposes of judicial review.

In addition to those reasons, the Medical Examiner has also determined that he needs as many of his staff as possible to review the video so that he and his staff can evaluate it. The insights of all his staff are important to the death determination process. Dr. Clark and the staff of the Medical Examiner's office may need to discuss the scene of the

death, as depicted in the video, as well as the decedent's injuries and medical history in light of the evidence contained in the video. This cannot be done with BNSF staff present. Nor is there any effective, practical way to accommodate the suggestion of BNSF that their staff be located out of earshot, but within view of the video recording and playback device to ensure that there is no copying of the video. Further, some of the Medical Examiner's staff, particularly the Medicolegal Investigators working different shifts, will have to review the video at a variety of times as circumstances permit when not otherwise occupied by their primary duties. This further compounds the complexity of the proposal by BNSF and makes it unworkable. CP 137-138.

The concerns of BNSF are also unreasonable where the Medical Examiner's office has a duty to keep the video and all death investigation records confidential. See RCW 68.50.105.

**K. IF THE COURT WERE FOR ANY REASON TO HOLD THE CURRENT SUBPOENA INVALID, IT SHOULD NONETHELESS ORDER THAT IF DR. CLARK REISSUES A SUBPOENA AFTER A JURY IS EMPANELED, BNSF IS OBLIGATED TO COMPLY WITH ANY SUCH SUBPOENA**

Regardless of how the Court rules on the motions for summary judgment, Dr. Clark has every intention of continuing with the inquest proceeding, completing it, and obtaining a death determination from the inquest jury pursuant to it. See Supplemental Decl. Dr. Clark, ¶ 6.



In its motion, BNSF argues that the subpoena is not valid because the inquest jury has not yet been empaneled. That argument implicitly acknowledges that the subpoena issued by the Medical Examiner will be valid, and BNSF will be obligated to comply with it, if the subpoena is issued after the inquest jury is empaneled.

The dispute in this case arguably boils down to a question of when an inquest is commenced. Commencement of the inquest could occur at any of three points: 1) when the Medical Examiner gives formal notice to the Superior Court of his intent to conduct the inquest, or 2) when the Medical Examiner asks that an inquest jury be empaneled; or 3) when the inquest jury is actually empaneled.

The statute granting the Medical Examiner subpoena authority, however, makes no reference to any triggering condition precedent for the subpoena authority to become active. *See* RCW 36.24.050. Indeed, the provision contains no express language limiting the Medical Examiner's subpoena authority to inquests, and it may arguably extend to all death investigations by the Medical Examiner. Nevertheless, Dr. Clark has limited himself to issuing the subpoena only after he had commenced the inquest.

Moreover, even if the Court were to hold the subpoena invalid on the ground that the inquest jury had not yet been convened, BNSF would

be obligated to comply with any subpoena issued by Dr. Clark once the inquest is convened. Dr. Clark intends to do so if the Court holds for any reason that the currently issued subpoena is invalid. CP 162. If relevant, the Court should address this possibility in its ruling and order.

## **VI. CONCLUSION**

This Court should reverse court and hold that it improperly issued the writ of prohibition. This Court should further hold Dr. Clark lawfully and validly exercised his subpoena authority and direct BNSF to comply with the subpoena and produce the video of the fatality Dr. Clark is investigating.

DATED this 1st day of February, 2018.

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**CERTIFICATE OF SERVICE**

On February 1, 2018, I hereby certify that I electronically filed the foregoing PETITIONERS' OPENING BRIEF with the Clerk of the Court and I delivered a true and accurate copy pursuant to the e-service agreement of the parties to the following:

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**February 01, 2018 - 4:09 PM**

**Transmittal Information**

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**Appellate Court Case Number:** 95015-6  
**Appellate Court Case Title:** BNSF Railway Company v. Thomas B. Clark, MD, et al  
**Superior Court Case Number:** 17-2-06719-4

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